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IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, *ET AL.*, *PETITIONERS*,

v.

HOBBY LOBBY STORES, INC., *ET AL.*, *RESPONDENTS*.

CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*,
PETITIONERS,

v.

KATHLEEN SEBELIUS, *ET AL.*, *RESPONDENTS*.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF FOR UNITED STATES SENATORS MURRAY, BAUCUS, BOXER, BROWN, CANTWELL, CARDIN, DURBIN, FEINSTEIN, HARKIN, JOHNSON, LEAHY, LEVIN, MARKEY, MENENDEZ, MIKULSKI, REID, SANDERS, SCHUMER, AND WYDEN AS *AMICI CURIAE* IN SUPPORT OF *HOBBY LOBBY* PETITIONERS AND *CONESTOGA* RESPONDENTS

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STATEMENT OF INTEREST[1]

United States Senators Patty Murray, Max Baucus, Barbara Boxer, Sherrod Brown, Maria

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

Cantwell, Benjamin J. Cardin, Richard J. Durbin, Dianne Feinstein, Tom Harkin, Tim Johnson, Patrick J. Leahy, Carl Levin, Edward J. Markey, Robert Menendez, Barbara A. Mikulski, Harry Reid, Bernard Sanders, Charles E. Schumer, and Ron Wyden respectfully submit this brief as *amici curiae*.

Amici were all Members of Congress at the time of enactment *both* of the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb–2000bb-4), and the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. Because *Amici* contributed to the passage of both bills, they are uniquely positioned to discuss the legislative history and intent of RFRA—and most qualified to explain how exempting secular, for-profit corporations from the Affordable Care Act's contraceptive-coverage requirement is inconsistent with the plain language and legislative intent of RFRA, and undermines the government's compelling interest in providing women access to preventive health care under the Affordable Care Act.

The Tenth Circuit's overly expansive decision will permit a secular, for-profit corporation's owners or shareholders to impose their religious beliefs on employees by denying female employees access to preventive health care, including insurance coverage for contraception. Congress could not have anticipated, and did not intend, such a broad and unprecedented expansion of RFRA. Nor did Congress intend for courts to permit for-profit corporations and their shareholders to use RFRA to

deny female employees access to health care benefits to which they are otherwise entitled. The Court should clarify that RFRA does not allow a secular, for-profit corporation to deny health coverage to their employees based on the religious objections of the corporation's owners.

SUMMARY OF ARGUMENT

1. The Tenth Circuit in *Hobby Lobby* grounded its decision extending free-exercise rights to secular, for-profit corporations in an erroneous interpretation of Congressional intent with respect to the Religious Freedom Restoration Act of 1993 (RFRA), codified at 42 U.S.C. § 2000bb–2000bb-4. As the Tenth Circuit saw it, Respondents Hobby Lobby and Mardel are "persons" under RFRA. The court then found that the contraceptive-coverage requirement imposed a substantial burden on Hobby Lobby and Mardel because they must choose either to compromise their religious beliefs or to pay significant penalties for failing to comply with the Patient Protection and Affordable Care Act (Affordable Care Act). The court deemed the government's interest in safeguarding public health and achieving gender equality not sufficiently compelling to justify such burdens.

The Tenth Circuit's decision runs afoul of both a plain-text reading of RFRA and RFRA's extensive and informative legislative history.

Congress passed RFRA to advance a single limited purpose: to restore the compelling-interest test to government actions that burden the free exercise of religion. The test Congress reinstated through RFRA—which was established and repeatedly articulated by this Court and others prior to RFRA—extended free-exercise rights *only* to individuals and

to religious, non-profit organizations. No Supreme Court precedent had extended free-exercise rights to secular, for-profit corporations. Thus, in passing RFRA, Congress had no rational reason to anticipate, nor could it have contemplated based upon that well-established precedent, that a court would later choose to unilaterally extend RFRA's protections well beyond those precedential bounds to secular, for-profit corporations.

2. Congress enacted the Affordable Care Act with full understanding of RFRA—and of its limited purpose. Congress also recognized the need to balance the government's compelling interest in extending women's access to preventive health care with respect for the traditional free-exercise rights of individuals and religious organizations, which is why Congress included the Affordable Care Act's religious exemptions for individuals and religious organizations. These exemptions strike such a balance precisely and accurately, and appropriately recognize the free-exercise rights Congress intended for RFRA to protect.

Exempting secular, for-profit corporations from the Affordable Care Act's contraceptive-coverage requirement is inconsistent with RFRA's legislative history and intent, and undermines the Affordable Care Act's carefully crafted balance between a compelling governmental interest and individual free-exercise rights.

ARGUMENT

I. CONGRESS DID NOT INTEND RFRA TO EXTEND FREE-EXERCISE RIGHTS TO SECULAR, FOR-PROFIT CORPORATIONS.

The Tenth Circuit concluded that RFRA protects for-profit corporations like Hobby Lobby and Mardel because nothing before the court suggested that Congress intended RFRA's protection of a "person's" free-exercise rights to exclude for-profit corporations. *Hobby Lobby*, Pet. App. 24a. The corporate parties—Hobby Lobby, Mardel, and Conestoga Wood Specialties Corporation and their shareholders—similarly contend that Congress did not intend to exclude for-profit corporations from RFRA. *Hobby Lobby*, Resp. Br. 24; *Conestoga*, Pet. Br. 24-25.

The Tenth Circuit and the corporate parties share an inaccurate understanding of RFRA's purpose, and the Tenth Circuit's conclusion is at odds with the expectations of the Members of Congress who passed RFRA. As we explain below, in enacting RFRA, Congress only intended to restore the compelling-interest test the Supreme Court had overturned three years earlier. Congress did *not* intend to extend statutory religious-exercise rights to secular, for-profit corporations that had never before enjoyed such protections. The text and legislative history of RFRA show that Congress carefully—and narrowly—drafted RFRA to plainly codify this intent. And neither RFRA's text nor its legislative history suggest that Congress had any reason to anticipate—much less intend—that twenty years after RFRA's enactment, courts would unilaterally extend its protections to secular, for-profit corporations or use it to elevate the religious beliefs of corporate shareholders over the rights of

employees to access preventive health care provided under the Affordable Care Act.

A. Congress Crafted RFRA Only To Restore The Compelling-Interest Test.

In *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), the Supreme Court overturned the compelling-interest test that historically applied to government actions alleged to burden free-exercise rights. That test, first set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and further discussed in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), required the government to justify any actions that substantially burden the First Amendment free-exercise right by demonstrating a compelling governmental interest. *Smith*, 494 U.S. at 883. After *Smith*, however, a neutral law of general applicability trumped the free-exercise right—meaning that if a law was both neutral and generally applicable, no compelling interest need be shown. *Id.* at 890. And after *Smith*, a plaintiff who claimed impingement of her free-exercise rights by a neutral and generally applicable law could prevail only by showing that the legislature had acted with an inappropriate motive. *See, e.g., You Vang Yang* v. *Sturner*, 750 F. Supp. 558, 560 (D.R.I. 1990).

A diverse coalition of religious organizations, public interest groups, and constitutional scholars petitioned the Court for rehearing in *Smith* to highlight the significant consequences of the Court's departure from the previously settled compelling-interest standard. Linda Greenhouse, *Court Is Urged to Rehear Case on Ritual Drugs*, N.Y. Times, May 11, 1990, at A16. The coalition's petition failed to persuade the Court to rehear the case, 496 U.S.

913 (1990), but the Court's decision spurred Congressional action.

In July 1990, Representative Stephen J. Solarz introduced the Religious Freedom Restoration Act of 1990 "[t]o protect the free exercise of religion." H.R. 5377, 101st Cong. (1990). In testimony before the House Judiciary Committee, Representative Solarz explained that the bill would "enable States to insist that their laws of general applicability be applied even when individuals say this would obligate them to violate the tenets of their faith if they can demonstrate they have a compelling interest in doing so and if they can demonstrate that they've chosen the least restrictive way of achieving that objective." Hearing on H.R. 5377 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong. (1990). Several months later, Senator Joseph R. Biden, Jr., introduced similar legislation that would "protect the free exercise of religion" by requiring the government to show that laws of general applicability that discriminate against religion are essential to furthering a compelling governmental interest and are the least restrictive means of doing so. S. 3254, 101st Cong. (1990). In his statement introducing this legislation, Senator Biden stated the bill's limited intent: "to restore the previous rule of law, which required the Government to justify restrictions on religious freedom." 136 Cong. Rec. 35840 (Oct. 26, 1990).

Congress's focus on restoring the compelling-interest test permeates each of six bills "[t]o protect the free exercise of religion" introduced between 1990 and 1993. *See* H.R. 5377 § 2(b)(2); S. 3254 § 2(b)(2); H.R. 2797 § 2(b)(1), 102d Cong. (1991); S. 2969 § 2(b)(1), 102d Cong. (1992); H.R. 1308 § 2(b)(1), 103d

Cong. (1993) (codified at 42 U.S.C. § 2000bb(b)); S. 578 § 2(b)(1), 103 Cong. (1993). The 1990 legislation introduced in the House by Representative Solarz and later that year in the Senate by Senator Biden proposed to permit government restriction of free-exercise rights only when the application of the restriction "is essential to further a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." S. 3254 § 2(b)(2); H.R. 5377 § 2(b)(2).

The next iterations of the legislation, introduced in 1991 by Representative Solarz and in 1992 by Senator Edward M. Kennedy, stated that the purpose of the legislation was "to restore the compelling interest test as set forth in *Sherbert* v. *Verner* and *Wisconsin* v. *Yoder*." H.R. 2797 § 2(b)(1); S. 2969 § 2(b)(1). That stated purpose remained in the religious freedom companion bills that would become RFRA, introduced in March 1993 by Senator Kennedy and Representative Charles E. Schumer. S. 578 § 2(b)(1); H.R. 1308 § 2(b)(1).

Congress passed RFRA in the fall of 1993 with widespread, bipartisan support—by a 97-3 vote in the Senate and a voice vote in the House of Representatives. Democrats and Republicans alike, including Senators Patty Murray, Max Baucus, Barbara Boxer, Sherrod Brown, Maria Cantwell, Benjamin J. Cardin, Richard J. Durbin, Dianne Feinstein, Tom Harkin, Tim Johnson, Patrick J. Leahy, Carl Levin, Edward J. Markey, Robert Menendez, Barbara A. Mikulski, Harry Reid, Bernard Sanders, Charles E. Schumer, and Ron Wyden, supported the legislation. Senator Kennedy noted RFRA's widespread support: "The act is supported by a broad coalition of organizations with

differing views on many issues of our day * * *. These organizations don't agree on much—but they do agree on the need to pass the Religious Freedom Restoration Act." 139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993).

Senator Bill Bradley explained that RFRA "restor[es] the legal standard that was applied to the decisions which preceded *Smith*, the compelling interest standard. RFRA simply insures that courts will protect the fundamental right to freely exercise one's religion at an appropriate level of scrutiny." 139 Cong. Rec. S14469 (daily ed. Oct. 27, 1993). Senator Kennedy similarly declared that RFRA was "designed to restore the compelling interest test for deciding free exercise claims * * * by establishing a statutory right that adopts the standard previously used by the Supreme Court." 139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993). Moreover, he emphasized RFRA's limited purpose: "The act creates no new rights for any religious practice or for any potential litigant." *Id.* When he signed RFRA, President William J. Clinton remarked that the Act "reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion * * *." Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2001 (Nov. 16, 1993).

This consistent legislative backstory is preserved in the statute itself, which expressly states that RFRA's purpose is "to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious

exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Thus it is clear that from the introduction of House Bill 5377 in 1990, through the introduction of similar bills in 1991 and 1992, and concluding with RFRA's passage in 1993, Congress consistently framed its limited intent and RFRA's limited purpose as, first, restoring the compelling-interest test that *Smith* had curtailed, and second, protecting the free exercise of religion by requiring the government to show a compelling justification for burdening a person's religious exercise.

B. Congress Could Not Have Anticipated RFRA's Application To Secular, For-Profit Corporations.

1. When Congress began laying the groundwork for RFRA in 1990, it did so against the backdrop of centuries of jurisprudence applying the First Amendment's protection of the freedom to exercise religion to individuals and to non-profit religious institutions. Against this backdrop—and in the marked absence of any statutory *expansion* of free-exercise protections—Congress had no reason to believe that secular, for-profit corporations could "exercise religion" when it drafted and enacted RFRA, or that courts would permit shareholders of such corporations to wield RFRA as a sword to force their religious beliefs on others.[2]

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[2] *See O'Brien* v. *U.S. Dep't of Health and Human Srvs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) ("RFRA is a shield, not a sword. It protects individuals from substantial burdens on religious exercise that occur when the government coerces action one's religion forbids, or forbids action one's religion requires; it is not a means to force one's religious practices upon others.").

The hearings and committee reports for House Bill 1308, which Congress enacted as RFRA, and Senate Bill 578, the corresponding bill in the Senate, reveal the scope of RFRA's intended reach. Of nineteen Supreme Court cases cited in the House and Senate Judiciary Committee reports accompanying the legislation, *none* so much as suggest that secular, for-profit corporations might possess free-exercise rights.[3] *See Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 524-525 (1993) (church's challenge to city ordinance regarding ritual slaughter of animals); *Smith*, 494 U.S. at 874 (individuals' challenge to a state controlled-substance law); *Hernandez* v. *Comm'r*, 490 U.S. 680, 683-684 (1989) (individuals' challenge to denial of tax deduction for payments made to churches for training courses); *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 443 (1988) (challenge by "an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California" to government harvesting and construction in a portion of a National Forest used for religious purposes); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 344-345 (1987) (prison inmates' challenge to policies that prevented their attendance at a weekly Muslim congregational service); *Bowen* v. *Roy*, 476 U.S. 693, 695 (1986) (individual's free-exercise challenge to statutory requirement of use of social security

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[3] This case list does not include those cited in the separate legislative discussions on whether RFRA should apply to prisoners.

number); *Goldman* v. *Weinbarger*, 475 U.S. 503, 504 (1986) (individual's challenge to air force regulation preventing wearing yarmulke while in uniform); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 577 (1983) (religious, nonprofit school's challenge to denial of tax-exempt status); *United States* v. *Lee*, 455 U.S. 252, 254 (1981) (individual employer's challenge to social security and unemployment insurance taxes); *Thomas* v. *Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 709 (1981) (individual's challenge to denial of unemployment compensation); *Harris* v. *McRae*, 448 U.S. 297, 320 (1980) (individuals' free-exercise challenge to Hyde Amendment); *Yoder*, 406 U.S. at 208-211 (individuals' challenge to compulsory school-attendance law); *Tilton* v. *Richardson*, 403 U.S. 672, 676-677 (1971) (individuals' challenge to federal aid for church-related colleges and universities); *Sherbert*, 374 U.S. at 399 (individual's challenge to state unemployment compensation statute); *Braunfeld* v. *Brown*, 366 U.S. 599, 600-601 (1961) (individuals' challenge to state criminal statute proscribing the retail of "certain enumerated commodities" on Sundays.); *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 629 (1943) (individuals' challenge to regulation requiring public school students to salute the American flag); *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 591-592 (1940) (individuals' challenge over expulsion for refusal to salute national flag); *Cantwell* v. *Connecticut*, 310 U.S. 296, 300-301 (1940) (individuals' free-exercise challenge to convictions for solicitation of money and inciting a breach of peace); *Reynolds* v. *United States*, 98 U.S. 145, 146 (1878) (individual's

challenge to bigamy statute); H.R. Rep. No. 103-88 (1993); S. Rep. No. 103-11 (1993).[4]

Similarly, *all* of the pre-*Smith* Supreme Court free-exercise cases mentioned in the House and Senate floor speeches during consideration of RFRA involved the free-exercise rights of individuals or of religious, non-profit organizations. *See* 139 Cong. Rec. S14461 (daily ed. Oct. 27, 1993); 139 Cong. Rec. S14350 (daily ed. Oct. 26, 1993); 139 Cong. Rec. H2356 (daily ed. May 11, 1993). So, too, did the examples of post-*Smith* infringements on the free-exercise right mentioned in the House and Senate floor speeches: autopsies of deceased Hmong and Jewish people; challenges to the practices of the Amish; a federal investigator fired because investigating a pacifist organization was against his religion; and evangelical churches being zoned out of commercial areas. *See* 139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993); 139 Cong. Rec. H2357, H2360 (daily ed. May 11, 1993).

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[4] Seven members of the House who offered their additional views on whether RFRA would be effective to reinstate the pre-*Smith* standard cited, in a footnote providing authority for an unrelated point about the effectiveness of free-exercise protections, one Title VII case in which the Ninth Circuit adverted to a for-profit corporation's "religious exercise." *See* H.R. Rep. No. 103-88, at 16 n.5 (citing *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988)). But even the *Townley* panel found it "unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers." 859 F.2d at 619-620.

2. Congress could have explicitly included secular for-profit corporations in RFRA. It did not. Indeed, even the earliest iterations of RFRA reveal a consistent lack of intent to break new ground by extending free-exercise protections to secular, for-profit corporations. *See, e.g.*, Hearing on H.R. 5377 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong. (1990) at 2, 28-29, 32-33, 35, 57 (referencing *Smith*, 494 U.S. at 874 (individuals' challenge); *Lee*, 455 U.S. at 254 (individual's challenge); *Yoder*, 406 U.S. at 208-211 (individuals' challenge); *Sherbert*, 374 U.S. at 399 (individual's challenge); *Barnette*, 319 U.S. at 629 (individuals' challenge)).

Some of the earliest versions of the bill that gave rise to RFRA defined person to include "both natural persons and religious organizations, associations, or corporations." *See* H.R. 5377 § 4(4) (introduced by Rep. Solarz in 1990, and defining "person" to "include[ ] both natural persons and *religious organizations, associations, or corporations*" (emphasis added)); S. 3254 § 4(4) (introduced by Sen. Biden in 1990, and defining "person" to include "natural persons, religious organizations, associations, *and corporations*" (emphasis added)). But the final version of the bill passed by Congress does not include such language. Thus, no one subsequently debated whether the "person" contemplated in RFRA went beyond the scope of those who were at that time entitled to claim the benefit of a free-exercise contention. Even if a single member of Congress may have fleetingly contemplated in 1990 the idea of *some* separate corporate personhood capable of exercising religion, that idea was left on the cutting-room floor, without

further explanation. *See Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.").

3. Moreover, during its consideration of RFRA, Congress repeatedly relied upon the longstanding view, based on existing jurisprudence, that free-exercise rights were limited to individuals and religious organizations. The House Judiciary Committee "expect[ed] that the courts [would] look to free exercise of religion cases decided prior to *Smith* for guidance * * *." H.R. Rep. No. 103-88, at 6-7. That jurisprudence has never extended free-exercise rights to secular, for-profit corporations. *See Hobby Lobby*, Pet. App. 115a (Briscoe, C.J., concurring in part and dissenting in part); *Conestoga*, Pet. App. 28a ("Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since Conestoga cannot engage in the exercise of religion, it cannot assert a RFRA claim.").

RFRA's limited scope also ensured it would not disturb the law governing "cases determining the appropriate relationship between religious organizations and government." H.R. Rep. No. 103-88, at 8; S. Rep. No. 103-111, at 12; *see* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 238-239 (1994). Jurisprudence on religious organizations' "participat[ion] in publicly funded social welfare and educational programs" was of particular to concern to Congress, as were prior precedents addressing religious organizations'

exemption from income taxes and other laws. H.R. Rep. No. 103-88, at 8; S. Rep. No. 103-111, at 12. Responding to this concern, the House Judiciary Committee explained that courts rely on the Establishment Clause—not the Free Exercise clause—to decide such cases. H.R. Rep. No. 103-88, at 8; *see* S. Rep 103-11, at 12-13. The committee report then identified two sections of RFRA that enforce this position that the free-exercise legislation would not change the relationship between religious organizations and government: the section requiring RFRA claimants to have Article III standing, H.R. 1308 § 3(c) (codified at 42 U.S.C. § 2000bb—1(c)), and the section providing that RFRA does not affect Establishment Clause jurisprudence, H.R. 1308 § 7 (codified at 42 U.S.C. § 2000bb-4). H.R. Rep. No. 103-88, at 8. The Senate Judiciary Committee Report included similar reassurances. *See* S. Rep. No. 103-11, at 12-13. Thus, as Congress understood the legislation before it, not even a *religious* organization would be in a position to claim *new* free-exercise rights as a result of RFRA.

Despite all this, certain contributing *amici* in the court below sought to characterize RFRA, after the fact, as a "super-statute" providing "heightened, across-the-board protection for the free exercise of religion." Brief of *Amici Curiae* Senator Orrin G. Hatch, *et al.*, at *6, *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294), 2013 WL 773280. That is not the statute Congress passed. And that reimagining of RFRA is inconsistent with the text of the statute, the interests of the diverse coalitions that supported it, and the members of Congress who drafted and passed it. Indeed, even the members of Congress

who expressed concerns about whether RFRA was sufficient to protect free exercise rights acknowledged that the law was simply "seeking to replicate, by statute, the same free exercise test that was applied prior to *Smith*." H.R. Rep. No. 103-88, at 16 (additional view).

Thus, despite the "unique opportunity presented by this legislation" to extend the reach of free-exercise protections, *id.*, Congress recognized, over and over again, that RFRA's purpose and scope were limited. RFRA's text clearly expresses the legislation's return to pre-*Smith* jurisprudence. The statute further contains provisions assuring that it would not expand or restrict the rights of religious organizations. *See* H.R. 1308 § 3(c) (codified at 42 U.S.C. § 2000bb—1(c)); H.R. 1308 § 7 (codified at 42 U.S.C. § 2000bb-4). The debates and hearings on RFRA further confirm that Congress was not deviating from decades of precedents and its own history of restricting free-exercise protections to individuals and non-profit, religious organizations. Consequently, Congress had no reason to contemplate in 1993 that courts would interpret the Act as expansively as the Tenth Circuit did for the first time in 2013. And nothing in the legislative history suggests they intended this application of RFRA. The foundation on which the Tenth Circuit built its decision is fundamentally flawed because it is based on a text that does not direct the result it reached there, and on a legislative history that does not exist.

II. EXEMPTING SECULAR, FOR-PROFIT CORPORATIONS FROM THE AFFORDABLE CARE ACT'S CONTRACEPTIVE COVERAGE REQUIREMENT IS NOT CONSISTENT WITH RFRA.

Throughout the debate on the Affordable Care Act—before and after passage—Congress carefully considered how to further the government's compelling interest in health care, and specifically in women's preventive care, while respecting the religious exercise rights protected by RFRA. A combination of statutory and regulatory exemptions for individuals and religious organizations ensures that the Act and its implementing regulations are the least restrictive means of furthering the government's compelling interest in access to preventive health care. *Nothing* in the Affordable Care Act altered the scope of RFRA, and there is no indication that the legislators who passed the Affordable Care Act ever contemplated extending RFRA's protections to secular, for-profit corporations.

A. The Affordable Care Act And Its Implementing Regulations Strike The Proper Balance Between The Government's Compelling Interest And Free Religious Exercise.

Congress carefully and deliberately structured the Affordable Care Act in accordance with RFRA's focus on "striking sensible balances between religious liberty and competing prior governmental interests" and its requirement that the government use "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §§ 2000bb(a)(5), 2000bb-1(b)(2). *Cf. Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 698 (1979) (Congress is presumed to legislate

with knowledge of court precedents). Among other things, the Senate debates prior to the Act's passage include an analysis from the O'Neill Institute advising that RFRA "prevents the federal government from enacting a law that substantially burdens an individual's exercise of religion, unless the government has a compelling interest." *See, e.g.*, 155 Cong. Rec. 32847 (2009). The O'Neill Institute also encouraged Congress to add a measure of protection for religious freedom. 198 Cong. Rec. S13721 (daily ed. Dec. 22, 2009).

Congress addressed concerns about potentially burdening religious exercise by including religious exemptions in the statute. Individuals who are members of recognized religious sects or divisions and adherents of the religion's established tenets are exempt from the Act's individual responsibility requirement. Pub. L. 111-148 § (d)(2)(A), 124 Stat. 119, 246 (codified at 26 U.S.C. § 5000A(d)(2)(A)). Similarly, the Act exempts individuals belonging to health care sharing ministries, defined as nonprofit organizations whose members "share a common set of ethical or religious beliefs and share medical expenses." Pub. L. 111-148 § (d)(2)(B), 124 Stat. 119, 246 (codified at 26 U.S.C. § 5000A(d)(2)(B)).

The Affordable Care Act also includes an amendment demonstrating Congress' intent to ensure and protect women's access to preventive health care, including contraception. During the 2009 debates leading up to the Act's passage, Senator Barbara Mikulski proposed an amendment to require health plans to cover comprehensive women's preventive care and screenings. That amendment, which came to be called the Women's Health Amendment, relied on comprehensive

guidelines developed by the independent Institute of Medicine and adopted by the Department of Health and Human Services. It required insurance coverage for "preventive care and screenings" for women to ensure "essential protection for women's access to preventive health care not currently covered in other prevention sections of the [Affordable Care Act]." *Mikulski Amendment Improves Coverage of Women's Preventive Health Services and Lowers Costs to Women*, http://www.mikulski.senate.gov/_pdfs/Press/ MikulskiAmendmentSummary.pdf (last visited Dec. 7, 2013); *see* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (2011). As Senator Feinstein explained, the Women's Health Amendment "will require insurance plans to cover at no cost basic preventive services and screenings for women. This may include mammograms, Pap smears, family planning, screenings to detect postpartum depression, and other annual women's health screenings." 155 Cong. Rec. S12,114 (daily ed. Dec. 2, 2009) (statement of Sen. Feinstein). *See also* 155 Cong. Rec. S12,033, S12,052 (daily ed. Dec. 1, 2009) (statement of Sen. Franken) ("[A]ffordable family planning services must be accessible to all women in our reformed health care system."). The Senate adopted the Women's Health Amendment by a vote of 61 to 39. *See* 155 Cong. Rec. S12,265, S12,277; 42 U.S.C. § 300gg-13(a)(4).

The inclusion of contraception among the preventive services guidelines required under the Affordable Care Act prompted additional attention to potential burdens on religious exercise from the Executive branch as well. The Act's implementing regulations include exemptions for religious

employers and eligible nonprofit religious organizations with religious objections demonstrating that the Executive branch understood Congress's intent to strike a careful balance between the government's interest in women's preventive health furthered by the Affordable Care Act, and RFRA-protected religious freedoms. *See* 26 C.F.R. § 54.9815-2713A(a) (eligible organizations); 45 C.F.R. § 147.131(a) (religious employers and eligible organizations). The regulations exempt more than 335,000 religious organizations, including churches and synagogues, from the contraceptive-coverage requirement. 45 C.F.R. § 147.131(a) (defining "religious employers"); 158 Cong. Rec. S375, 377, 379 (daily ed. Feb. 7, 2012). The regulations also include an "accommodation" for non-profit organizations that hold themselves out as religious and oppose birth control for religious reasons. 45 C.F.R. § 147.131(b). Such non-profit organizations do not have to provide contraceptive coverage in their health insurance plans; instead, their employees will receive this benefit directly from their insurance company. Women who work in some religiously affiliated organizations, as Senator Jeanne Shaheen explained, thus may choose to use birth control or access the Act's preventive health measures in spite of the religious affiliation of their employer. 158 Cong. Rec. S375. "That is their decision. It is not their employer's." *Id.*

By adding these exemptions to those Congress passed in the statute, the Administration furthered the balance Congress sought to strike in the Act between the beliefs of non-profit religious organizations and women's access to critical preventive health care. As one Member noted, the

Administration's regulations respect the rights of religious institutions without "trampl[ing] on the rights of others." *Id.* at H628 (daily ed. Feb. 8, 2012) (statement of Representative Eleanor Holmes Norton). *See also id.* at H586 (statement of Representative Gwen Moore that the exemption "represents a respectful balance between religious persons and institutions and individual freedom"); *id.* at H625 (statement of Representative Nita Lowey that the exemption "strikes a delicate balance representing the rights of both religions ideologically opposed to birth control and American women").

When considered together, the statutory religious exemptions for individuals and health sharing ministries and the administrative exemptions for religious employers and eligible nonprofit religious organizations collectively demonstrate how the Affordable Care Act strikes a balance between Congress' interest in women's right to access preventive health care and the free-exercise rights of individuals and religious organizations under RFRA.

In 2012, the Senate directly weighed in on the question whether secular non-profit corporations should be able to refuse to comply with the contraceptive coverage requirement when it considered—and rejected—an expansive application of religious free-exercise rights by voting down an amendment to the Affordable Care Act that would have enabled *any* secular employer or insurance provider to deny coverage based on religious beliefs or moral convictions. Senator Mikulski characterized this so-called "conscience" amendment, introduced by Senator Roy Blunt, as "put[ting] the personal opinion of employers and insurers over the practice of medicine." 158 Cong. Rec. S1127 (daily

ed. Feb. 29, 2012). Senator Richard Durbin similarly recognized the potential reach of the amendment: "[I]t would allow employers to deny coverage for any health service. * * * The Blunt amendment will have a harmful effect on all people and would undermine our Nation's effort to ensure that everyone in this country has access to a basic standard of health coverage." *Id.* at S1078 (daily ed. Feb. 28, 2012). Senator Durbin further explained that the Affordable Care Act and its implementing regulations struck the proper "balance between respecting the conscience and religious values of certain institutions while still protecting the freedom of individuals." *Id.* Senator Al Franken described the amendment as "violat[ing] a core belief in our society that our religious doctrines are our own and that each of us, every woman and man in our society, has the right to make decisions about our own health for ourselves and for our families." *Id.* at S1083. And Senator Carl Levin also spoke out against the amendment; he explained that it would "codify infringement on personal healthcare decisions, would grant an employer the right to substitute his moral convictions for those of his employees, and would effectively deny access to critical healthcare services." *Id.* at S1141.

The Senators who opposed the amendment were not only concerned about the amendment's proposed infringements on personal decisions about contraception but also about the doors that passage of the amendment would open. Senator Patrick Leahy explained that the "amendment would allow any employer or insurer to refuse contraceptive coverage, annual well-women visits, gestational diabetes screening and domestic violence

screenings." *Id.* at S1171. Similarly, Senator Patty Murray described the amendment as a "radical assault on the comprehensive preventive health care coverage" that would allow employers to eliminate coverage for children's immunizations and prenatal care for children born to unmarried parents based on personal objections. *Id.* at S1172.

The Senate voted down the amendment 51-48. *Id.* at S1172-1173 (daily ed. Mar. 1, 2012).

B. Congress Did Not Understand The Affordable Care Act To Change The Scope Of RFRA.

Congress passed the women's preventive services provision to advance the health and equality of women in this Nation. Congress also acknowledged the need to balance the Affordable Care Act's broad goals with respect for the religious beliefs of individuals and some religious organizations. Nowhere did Congress go so far as to suggest that this balance should reach secular, for-profit corporations—indeed, the Senate explicitly rejected such an attempt to do so when it rejected an amendment on this very subject.

The Tenth Circuit's decision, however, authorizes an even more extreme situation than the one Senator Levin posed when he spoke out against the 2012 amendment—one in which shareholders of a secular, for-profit corporation deny their employees access to critical healthcare services as a result of their own religious convictions. The Congress that passed the Affordable Care Act could not have anticipated such a vast extension of RFRA.

The free exercise rights of *individuals* and *religious organizations* were a focus of debates about the Affordable Care Act, just as they had been for RFRA.

Most notably, there was no focus on—or even any discussion of—secular, for-profit corporations. During debate on the contraceptive-coverage requirement and related administrative regulations and policy, Senator Mike Johanns offered the view that "*religious organizations* are forced to face two options: act against their convictions or drop health care coverage altogether." 158 Cong. Rec. S331 (daily ed. Feb. 6, 2012) (emphasis added). Similarly, Senator Dan Coats claimed that "[a] wide variety of *religious institutions and organizations* across the country will resist providing insurance coverage for birth control." *Id.* at S370 (daily ed. Feb. 7, 2012) (emphasis added). And Senator John Boozman expressed concern about "protect[ing] *religious organizations*" from the effects of the implementing regulations. *Id.* at S371 (emphasis added). *See id.* at S373 (statement of Senator Kelly Ayotte arguing that the contraceptive-coverage "mandate places *religious institutions*" in an untenable position) (emphasis added).

The concurrent debate in the House even more directly addressed the application of the contraceptive-coverage requirement for employers. As Representative Jerrold Nadler explained, "The liberty of the church must be protected in its churchly function and in its function as a religious institution. In its function as an employer, the liberty belongs to the employees." 158 Cong. Rec. H629 (daily ed. Feb. 8, 2012). He further noted, "[W]e must not confuse the religious liberty of the church to propagate its views and to conduct its religious affairs as it sees fit with the liberty of employees in a secular institution affiliated with the church to have the normal protections against

discrimination and the normal rights that we afford all people." *Id.*

These debates, and the regulations that prompted and followed them, demonstrate that the free-exercise rights that Congress considered during the debate over the Affordable Care Act's implementing regulations were those of individuals and religious organizations. *Nothing* in the Affordable Care Act altered the scope of RFRA, and there is no indication—none—that the legislators who passed the law, debated the contraceptive-coverage mandate, and examined the mandate's implementing regulations, ever contemplated extending RFRA's protections to secular, for-profit corporations.

The Tenth Circuit, however, saw things quite differently. Over the objections of the dissenting judges, the Tenth Circuit broadly equated the religious beliefs of a corporation's shareholders with those of the corporation *itself*. This effectively allows a secular, for-profit corporation's shareholders, through the corporation, to impose their religious beliefs on their employees and to deny employees health benefits and rights to which they are entitled based on those corporate shareholder beliefs. That holding is flatly contrary to the text and intent of RFRA. And that court-created exemption for secular, for-profit corporations will only widen the gap in women's health care that the Affordable Care Act sought to close.

RFRA's supporters represented an unusual convergence of interests: an "unprecedented coalition of religious denominations and civil rights groups * * * united" in the name of religious liberty. 139 Cong. Rec. H2357 (daily ed. May 11, 1993). And RFRA was enacted by a wide margin by a bipartisan

Congressional group with full understanding of the rights—the rights of *individuals* and *religious institutions*—they sought to restore through that statute. It is not correct—indeed, it is not fathomable—that the bipartisan group of legislators who worked to enact it would intentionally have advanced legislation to transform free exercise from an individual right to a corporate benefit, from an individual's shield to an employer's sword. Yet that is precisely what the Tenth Circuit's decision suggests: that a highly celebrated, and widely shared, vision of the importance of the right to free exercise instead opened the door to allowing corporate shareholders to impose their religious beliefs on others, by virtue of their control of secular, for-profit corporations.

This gross misapplication of RFRA creates a situation where a person's right to freely exercise her religion is freed from the undue interference of government—but is newly subjected to the undue interference of her employer. Nothing in RFRA's text or legislative history supports such an application. Congress's carefully crafted response to *Smith* does not license a secular, for-profit corporation or its shareholders to disregard the government's compelling interest in ensuring women employees' access to health care.

CONCLUSION

For the foregoing reasons, and those in the respective party briefs amici support, the Tenth Circuit's decision should be reversed and the Third Circuit's decision should be affirmed.

Respectfully submitted,

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